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BEBE SAKIMAH MOHD ASROF v. PENDAFTAR HAKMILIK NEGERI PERAK

HIGH COURT MALAYA, IPOH
SU TIANG JOO JC
[ORIGINATING SUMMONS NO: AA-24NCVC-478-11-2019]
B 21 OCTOBER 2020
[2020] CLJ JT (14)

C ***LAND LAW:*** *Malay Reservations – Malay holding – Registration of property expressly stated as Malay Reservation Land – Presentations for registration by purchaser rejected by Land Office – Whether purchaser Malay – Whether non-Malay could be registered as proprietor of Malay Reservation Land – Whether prohibitions and restrictions against dealings apply to all Malay Reservation Lands – Whether applied to property in question – Whether property Malay holding – Whether Land Office complied with necessary statutory steps to declare property to* D *be Malay holding – Whether mere endorsement of Malay Reservation Land without particulars sufficient for property to be declared Malay holding – Whether purchaser could be registered as proprietor of property – Malay Reservations Enactment (FMS Cap. 142)*

E ***LAND LAW:*** *Malay Reservations – Registration – Registration of property expressly stated as Malay Reservation Land – Presentations for registration by purchaser rejected by Land Office – Purchaser paid registration fees and penalty for presentations – Whether purchaser entitled to refund of fees and penalty – National Land Code, ss. 293(1) & 293(3)(a)*

F ***EVIDENCE:*** *Burden of proof – Legal and evidential burden – Land law – Registration by non-Malay of property expressly stated as Malay Reservation Land – Presentations for registration by purchaser rejected by Land Office – Whether property Malay holding – Whether Land Office bore evidential burden to prove statutory steps have been taken to ensure property was Malay Reservation Land and Malay holding – Whether Land Office complied with necessary statutory steps to* G *declare property to be Malay holding – Whether there was evidence to support – Evidence Act 1950, ss. 101, 102, 103 & 106*

The plaintiff was the successful bidder in the auction of a property situated in Perak. In the proclamation of sale, the property was expressly stated as a Malay Reservation Land ('MRL'). After paying RM98,000, the plaintiff H attempted to register herself as the proprietor of the property, at the land office. However, the presentation was rejected by the defendant on the grounds that (i) the timeline for suspension for the plaintiff to prove that she, or her parents, were of Malay descent, had expired without her providing any documents for confirmation of the same; and (ii) her birth certificate I revealed that her parents were not Malays ('first rejection'). The plaintiff appealed to the defendant against the first rejection and the defendant requested that the plaintiff make a fresh presentation with supporting

documents. The plaintiff obliged ('second presentation') but, again, her presentation was rejected ('second rejection') on the grounds that (i) the property was a MRL and could only be transferred to a Malay; and (ii) the plaintiff was not a Malay. Aggrieved by the defendant's rejections, the plaintiff initiated the present action, seeking orders, *inter alia*, that: (i) the property under MRL was not a Malay holding and, therefore, as the successful bidder, she was entitled to have the property registered under her name; (ii) a document of title be registered and issued under her name; (iii) the defendant register and issue an issue document of title for the property in her name without levying any fee or penalty; and (iv) the defendant refund the registration fees of RM150 for the first presentation and another RM150 registration fees and RM750 penalty for the second presentation. Despite accepting the position taken by the defendant that she was not a Malay, the plaintiff argued that (i) MRL has two categories: Malay holding and non-Malay holding; (ii) the property was not a Malay holding and, therefore, the defendant ought to register the plaintiff as the proprietor of the property; (iii) although there was an endorsement of MRL in the title to the property, there were no other details on its status; and (iv) since the defendant failed or neglected to enter the requisite memorial with a note on the area and *Gazette* notification number on the issue document of title whether the property has been declared as Malay holding, it was presumed that (a) there was an incomplete endorsement; and (b) a mere endorsement of MRL was insufficient for the property to be a Malay holding. The primary questions that arose for adjudication were (i) could a non-Malay be registered as a proprietor of MRL; (ii) whether the property, although under MRL, was a Malay holding; and (iii) when challenged as to whether the first and second steps (out of the three-step process for a land to be declared under MRL to be a Malay holding) have been carried out, who has the burden of proof to show that they have been carried out.

Held (granting order in terms):

(1) Since the property was situated in Perak, the applicable legislation was the Malay Reservation Enactment (FMS Cap. 142) ('MRE'). Sections 6(i) and 2(a) of the MRE spell out a three-step process for a land to be declared under Malay Reservation post the commencement of the MRE to be a Malay holding. The three steps are: (i) a publication is made in the *Gazette* making notification of the alienated lands that are included in a Malay Reservation; (ii) the Collector of the district in which such lands are situated shall present to the proper registering authority a requisition in Form A in the First Schedule containing a list of all alienated lands included and affected by such declaration to note in his registers of titles the fact of the inclusion of such lands in such Malay Reservation; and (iii) the proper registering authority shall make a memorial upon every register of document of title included in the lands declared as Malay Reservation. (paras 22 & 63)

(2) The contents of the prescribed Form A would supply the information that the first of the three steps had been carried out with the particulars of the lands specified in a schedule accompanying the Form A detailing the titles of the lands included in the Malay Reservation as declared and the registration of this Form A would complete the second step. It is only after the registration of the particulars, as required in the requisition in Form A, against the register document of title of the said property coupled with a memorial on the register and issue document of title of the property could it then be deemed to be a Malay holding under the law. (paras 66 & 67)

(3) The issue document of title of the property showed that the words 'Pengisytiharan Rezab Melayu' had been set out on the title but with no particulars of (i) the date; (ii) the *Gazette* of when the property was included in a MRL; and (iii) when the requisition in the prescribed Form A was presented. The proviso in s. 2(a) of the MRE makes it clear that no such interest shall be deemed to be a Malay holding until there shall have been registered against the register document of title for such land a requisition in the prescribed Form A in the First Schedule. Given this statutory injunction, the interest in the form of the property could not be deemed as a Malay holding until there is evidence to prove that there shall have been registered against the register document of title for such land a requisition in the prescribed Form A in the First Schedule. (paras 64 & 65)

(4) It is plainly set out in s. 6(v) of the MRE that the particulars of the memorial that are to be endorsed onto the title is the requisition in Form A in the First Schedule seeing that the words 'shall make a memorial thereof' with the word 'thereof' coming immediately after the words 'requisition in the Form A in the First Schedule'. Besides the plain meaning of what particulars are required for the memorial, the meaning of the word 'thereof' must necessarily be interpreted *noscitur a sociis*, that is, in its context. There were merits in the plaintiff's submission the defendant had not complied with the requirement that the particulars of a lawful memorial pursuant to s. 6(v) of the MRE be entered onto the title of the property and following that, the property was not a Malay holding. (paras 68, 69 & 73)

(5) Pursuant to ss. 101, 102, 103 and 106 of the Evidence Act 1950, the defendant had the legal and evidential burden to prove that the property was a MRL and was a Malay holding so as to invoke all the prohibitions and restrictions in its dealings as provided by the law which the defendant sought to rely upon to defeat the plaintiff's claim. Furthermore, there are positive acts required by s. 6 of the MRE of the proper registering authority before the land could be deemed to be a Malay holding. Whether these acts have been carried out was a question of fact and it was for the defendant to lead evidence that these acts had

been carried out because they were especially within the defendant's knowledge. The defendant had to prove that all three steps had been taken but there was no evidence that the first and second steps had been undertaken for the property. (paras 76 & 78)

(6) The property was not a Malay holding and could be registered under the plaintiff's name. The defendant was ordered to register and issue the plaintiff an issue document of title in the plaintiff's name. The provisions of s. 293(1) of the National Land Code ('NLC') stipulates that every instrument presented has to be accompanied by the prescribed registration fee and, pursuant to s. 293(3)(a) of the NLC, the Registrar ought not to have penalised the plaintiff. The penalty of RM750 was ordered to be refunded to the plaintiff. (paras 87 & 88)

Case(s) referred to:

Abdul Aziz Mohd Alias v. Timbalan Ketua Polis Negara, Malaysia & Anor [2010] 3 CLJ 643 FC ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Derek Victor Cawton & Anor v. Fatimah Mohd Hashim [2015] 5 CLJ 788 CA ***(refd)***

Fauziah Ismail & Ors v. Lazim Kanan & Orang-Orang Yang Tidak Diketahui [2013] 7 CLJ 37 CA ***(refd)***

Hanisah v. Tuan Mat [1970] 1 LNS 33 FC ***(refd)***

Rohaya Ali Haidar v. AmBank (M) Bhd [2016] 4 CLJ 563 CA ***(refd)***

Syed Shaharul Mohamed Nasir & Anor v. Pentadbir Tanah Daerah Kelang & Anor [2020] 5 CLJ 842 HC ***(refd)***

Tan Hong Chit v. Lim Kin Wan [1964] 1 LNS 195 FC ***(refd)***

Zaleha Sahri v. Pendaftar Hakmilik Tanah Johor [1996] 2 CLJ 147 HC ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 101, 102, 103, 106

Federal Constitution, art. 160(2)

Interpretation Acts 1948 and 1967, s. 18(2)

Malay Reservations Enactment (FMS Cap 142), ss. 2(a), 6(i), (ii), (iii), (v)(b), (vi), (vii), 7, 8(ii), 9, 10, 11, 12, 13, 14, 15, 16(ii)(a), (b), (iii), 19, 21, First Schedule

National Land Code, ss. 4(2)(b), 259(3A), 293(1), (2), (3)(a)

For the plaintiff - Norazura Mohamed Mokhtar; M/s Azura Mokhtar & Low

For the defendant - Suhaila Haron; Assistant Legal Advisor, State Legal Advisor, Perak

Reported by Najib Tamby

JUDGMENT

Su Tiang Joo JC:

Introduction

[1] The plaintiff made a successful bid for a piece of property at a court ordered auction. She proceeded to pay for the purchase price in full. However, her attempt to have herself registered as the proprietor of the

property, which is a Malay Reservation land, failed not once but twice. She then launched this suit for, *inter alia*, an order that the defendant do register her as the proprietor of the property.

Issues

[2] The issues which arose for consideration by the court are:

(i) Can a non-Malay be registered as a proprietor of Malay Reservation land; and

(ii) Who carries the burden of proof that the Malay Reservation land is a Malay holding.

Facts

Plaintiff Successful At Court-held Auction

[3] Bank Islam Malaysia Berhad successfully obtained an order for sale of a piece of property held under GRN 13742 Lot No. 3788, Mukim Lekir, Manjung, Perak Darul Redzuan together with a house erected thereon (hereinafter called "the said property").

[4] The said property was put up for auction.

[5] The proclamation of sale expressly carried a statement that the property is subject to "Pengisytiharan Rezab Melayu" that is Malay Reservation.

[6] There was an accompanying note saying, "Prospective bidders are advised to conduct an official title search at the land office and to inspect the subject property, check all arrears, encumbrances and confirm the property before the auction sale."

[7] On 8 September 2015, the plaintiff was successful at the auction for the said property with a bid of RM98,000. She paid a deposit of RM9,500 followed by the balance of RM88,500 to Bank Islam Malaysia Bhd on 21 September 2015.

[8] Two months later, on 26 November 2015, her former solicitors, Messrs KW Chong & Partners, presented at the land office the certificate of sale by court (Form 16F) issued pursuant to s. 259 of the National Land Code (Act 56) (Revised in 2020 wef 15 October 2020 and now known as Act 828) (hereinafter referred to as "NLC") for her to be registered as the proprietor. The Form 16F was executed by the Senior Assistant Registrar of the High Court in Malaya at Ipoh.

[9] Section 259(3A) of the NLC is reproduced below:

> ... where the chargee is a financial institution, the purchaser at the sale shall, upon payment of the full amount of the purchase price to the chargee and upon receipt of certification in writing from the chargee not

later than fourteen days following payment of such sum, that the balance or the full amount of the purchase price has been paid, shall be entitled to receive from the officer of the Court:

(a) a certificate in Form 16F that the land or lease in question has been sold to him under the authority of this Act (which certificate shall, as provided by section 267, be registrable by the purchaser as if it were an instrument in dealing);

(b) ...

[10] Together with the presentation, she was made to pay a fee of RM150 although she contends that such a fee is not payable as the presentation of Form 16F was made pursuant to a court order.

First Rejection

[11] However, on 23 December 2015, the defendant rejected her presentation on the grounds that the timeline for suspension for her to prove that she or her parents are of Malay descent had expired without her providing any documents to confirm that she is a Malay or that her parents are of Malay descent and that her birth certificate, in fact, shows that her parents are not Malays.

[12] The matter went silent for a while.

Further Action

[13] In March 2018, the plaintiff appointed her current solicitors and lodged an appeal with the defendant against the first rejection.

[14] Her grounds of appeal were that:

(i) the certificate of sale by court (Form 16F) is issued and executed by the Senior Assistant Registrar of the High Court and carries with it the authority of the court and any refusal/failure/neglect to comply with the said court order is deemed to be an act of contempt of the court's order; and

(ii) the reason for the rejection on the ground that the category of land is Malay Reservation is not a strong ground because the court was already aware of the same with the said property not being under the category of Malay holding.

[15] On 29 March 2018, the defendant responded to the plaintiff's appeal and requested the plaintiff to attend at the office of the defendant with supporting documents to make a fresh presentation.

[16] The plaintiff did so and a fresh application was made under Presentation No. 32431/2019.

Second Rejection

[17] However, by letter of rejection dated 14 October 2019, the defendant again rejected the presentation of the Form 16F.

[18] The ground for the (second) rejection was in the main that the said property was Malay Reservation land and can only be transferred to a Malay and the plaintiff is not a Malay.

[19] The plaintiff was aggrieved by this second rejection because having been asked to pay a sum of RM150 for the registration and another RM750 as penalty for the second presentation, she assumed that this time around the presentation of the Form 16F would be registered and that the issue document of title would be issued with her registered as the proprietor of the said property.

Suit

[20] Aggrieved by the defendant's rejections, the plaintiff commenced this action for the following orders that:

(i) the said property under Malay Reservation was not a Malay holding and therefore does not prevent the plaintiff from making a bid for it at the public auction, and when having made a successful bid pursuant to an order of sale made by the court, she was entitled to present the certificate of sale by court (Form 16F) for the said property to be registered under her name;

(ii) the said property is not a Malay holding and a document of title can be registered and issued in her name;

(iii) the defendant do register and issue an issue document of title for the said property in her name without levying any fee or penalty on her within 14 days from the date of the order to be made;

(iv) the defendant do refund to her the registration fees of RM150 for the first presentation and another RM150 registration fee plus the RM750 penalty for the second presentation;

(v) costs;

(vi) such further or other relief as this Honourable Court may deem fit and just.

The Law On Malay Reservation

[21] Land comes under the purview and control of each of the respective States and Federal Territories in Peninsular Malaysia, Sabah and Sarawak. There are different legislations relating to Malay Reservation in each of the States in Peninsular Malaysia with the exception of Penang.

[22] The said property is situated in Perak and the applicable legislation is the Malay Reservations Enactment (FMS Cap. 142) (hereinafter referred to as "the MRE") which was originally enacted and published as FMS En. 30 of 1933 which came into force on 15 December 1933 – see Malay Reservation Enactments in Peninsular Malaysia (Third Edition ILBS).

[23] There is a general prohibition contained in s. 8 of the MRE that no Malay holding shall be transferred, charged or otherwise disposed of to any person not being a Malay, and no memorandum of transfer, charge or lease in contravention of this section shall be capable of registration in any Land Office or Registry of Titles.

[24] Section 19 of the MRE provides that dealings contrary to the MRE is void. The provisions of this section are as follows:

> (i) All dealings or disposals whatsoever and all attempts to deal in or dispose of any **Malay holding** contrary to the provisions of this Enactment shall be null and void and no rent paid in pursuance of any such dealing disposal or attempts shall be recoverable in any Court.
>
> (ii) No action for breach of contract shall lie in respect of any dealings in or disposal of or any attempt to deal in or dispose of any Malay holding contrary to the provisions of this Enactment.
>
> (emphasis added)

[25] The prohibition strikes at dealings in or disposal of or any attempt to deal in or disposal of **any Malay holding**. (emphasis added)

[26] Such a prohibition overrides any dealings or disposal under the NLC as can be seen in the express provisions of s. 4(2)(b) of the NLC which in summary provides that:

> Except in so far as it is expressly provided to the contrary, nothing in this Act shall affect the provisions of any law for the time being in force relating to Malay reservations or Malay holdings; ... and, in the absence of express provisions to the contrary, if any provisions of this Act is inconsistent with any provision of any such law, the latter provision shall prevail, and the former provision shall, to the extent of the inconsistency, be void.

[27] This is further underscored by the provisions of s. 21 of the MRE which provides as follows:

> If in any case any conflict shall arise between the provisions of this Enactment and the provisions of the Land Code*, or of the Civil Procedure Code*, or of the Powers of Attorney Enactment*, the provisions of this Enactment shall prevail.

(*The Land Code is now the NLC, the Civil Procedure Code is now the Rules of Court 2012 and the Powers of Attorney Enactment is now the Powers of Attorney Act 1949 (Act 424)).

[28] In *Derek Victor Cawton & Anor v. Fatimah Mohd Hashim* [2015] 5 CLJ 788 it was held by the Court of Appeal that by reason of the very clear prohibition in s. 8 (of the MRE Pahang which is *pari materia* with the MRE Perak) the equitable doctrine of estoppel cannot be applied and went on to hold that in the face of such a clear prohibition, no rule of equity is to be allowed to stand in the face of the objective of statute law.

[29] In another case, the Court of Appeal had occasion to hold that even a long period of occupation and stay on the land by a non-Malay could not create any form of entitlement to the land, see *Fauziah Ismail & Ors v. Lazim Kanan & Orang-Orang Yang Tidak Diketahui* [2013] 7 CLJ 37; [2013] 5 MLJ 423.

[30] Besides the aforementioned absolute prohibition, there are restrictions in the MRE against transfers, charges and leases (s. 8); dealings by attorneys (s. 9); caveats based on lien by deposit of title (s. 10), other caveats (s. 11); bankruptcy (s. 12); attachments in execution (s. 13); trusts (s. 14) and grants of probate and letters of administration (s. 15). Each and every one of these statutory restrictions are expressed to apply to a Malay holding.

Whether The Plaintiff Is A Malay

[31] Article 160(2) of the Federal Constitution carries the following definition for a Malay – a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom and (a) was before Merdeka Day born in the Federation or in Singapore or born of parents one of whom was born in the Federation or in Singapore, or is on that day domiciled in the Federation or in Singapore; or (b) is the issue of such a person.

[32] In the MRE, s. 2 provides that "Malay" means a person belonging to any Malayan race who habitually speaks the Malay language or any Malayan language and professes the Moslem religion.

[33] On whether the plaintiff is a Malay, the defendant would have to prove that the plaintiff is not a Malay. In a case involving the Kelantan Malay Reservations Enactment, 1930, the late Suffian FJ (who went on to be the Lord President) held in the Federal Court in *Hanisah v. Tuan Mat* [1970] 1 LNS 33; [1970] 1 MLJ 213 that:

> There was no oral or documentary evidence in these proceedings. There was only the affidavits of the parties, each flatly contradicting the other. *Bearing in mind that it was for Tuan Mat, the respondent, to satisfy the court that Hanisah is not a Malay* and not a native of Kelantan, I do not think that the evidence produced by him can be said to do so. (emphasis added)

(but see *Syed Shaharul Mohamed Nasir & Anor v. Pentadbir Tanah Daerah Kelang & Anor* [2020] 5 CLJ 842; [2020] 9 MLJ 598 where the HC held that it was for the applicants to prove they are Malays)

[34] It is interesting to read in the High Court case of *Zaleha Sahri v. Pendaftar Hakmilik Tanah Johor* [1996] 2 CLJ 147; [1996] MLJU 1, that the plaintiff, a Malaysian Malay, who married a Singaporean Malay and who followed her husband to Singapore and became a Singapore citizen, found out later that for purposes of the Malay Reservations Enactment 1936, the Johore State Government had made a ruling in 1986 *vide* Pekeliling PTG Bil.1/1989 that only a Malaysian Malay is considered a Malay. The ruling reads as follows:

> 2. Tafsiran "Melayu"
>
> Pehak Berkuasa Negeri Melayu telah memutuskan supaya Tafsiran "Melayu" di bawah Enakmen Melayu 1936, hanyalah meliputi orang-orang Melayu yang terdiri daripada Warganegara Malaysia.

[35] However, whether the plaintiff is a Malay or not need not detain us, as counsel for the plaintiff accepts the position taken by the defendant that the plaintiff is not a Malay. This concession was made by counsel for the plaintiff during oral submissions made on 21 September 2020.

Non-Malay Holding

[36] However, that the plaintiff is a non-Malay does not put an end to the action.

[37] As can be seen above, the prohibitions and restrictions against dealings in or disposals or attempts to do so of Malay Reservation land only apply to a Malay holding.

[38] It is the plaintiff's case that Malay Reservation land has two categories, Malay holding and non-Malay holding. On the materials before the court, the said property is **not a Malay holding** and by reason thereto, although the plaintiff concedes she is a non-Malay, the defendant ought to have allowed her to be registered as a proprietor thereof.

[39] The court will now deal with whether all the land categorised as Malay Reservation is a Malay holding. If it is, the prohibition and restrictions apply and the plaintiff's action has to be dismissed.

[40] That there is land included under Malay Reservation where a non-Malay could lawfully be a registered proprietor is recognised in the provision of s. 8(ii) MRE which is reproduced as follows:

> **If any land included in a Malay Reservation** is sub-divided and sub-divisional titles registered therefor **and one or more of the proprietors of such land** are Malays and one or more of the proprietors of such land are persons who **are not Malays** and there are simultaneously presented to the proper registering authority cross-transfers of such sub-divisional titles, such cross-transfers may notwithstanding anything contained in sub-section (i) be registered by such proper registering authority.
>
> (emphasis added)

[41] Section 6(vi) MRE also makes it clear that the proper registering authority is not allowed to enter any memorial in the register or issue document of title that the land is a Malay holding even if the land is categorised as Malay Reservation if the sole proprietor is not a Malay or in the case of co-proprietorship, of which none of the co-proprietors are Malays. Section 6(vi) provides as follows:

> Notwithstanding anything hereinbefore in this section contained the proper registering authority shall not make any memorial under this section on the register or issue document of title for any land of which the sole proprietor is not a Malay or of which none of the co-proprietors are Malays.

[42] The plaintiff's diligence in pursuing this action sees her producing a copy of a title (encl. 9 Tab 1) held under H.D. (D) 40604 PT 42184 carrying an endorsement "Tanah Simpanan Melayu Dalam Kawasan Manjung" with the registered proprietor being one Chieng Lee Chong who in all probability is not a Malay. It would be opportune to observe here that the said property is in the District of Manjung.

[43] However, if the land mentioned in s. 6(vi) MRE above is [later] transferred to a Malay, pursuant to s. 6(vii) MRE, the proper registering authority shall present a requisition in Form A in the First Schedule relating to such land and make a memorial on the register or issue document of title. Thereafter, such land will be a Malay holding.

[44] In *Tan Hong Chit v. Lim Kim Wan* [1964] 1 LNS 195; [1964] 30 MLJ 113B, the Federal Court held that when a piece of land in the Malay Reservation area is registered under the name of a non-Malay who had acquired the land prior to the creation of the Malay Reservation, the non-Malay can transfer or charge to any non-Malay and any subsequent transfer or charge to a non-Malay can be effected.

[45] The court, therefore, accepts the plaintiff's submissions that not all Malay Reservation land is necessarily a Malay holding.

Malay Holding

[46] We now turn to, what under the law is a Malay holding in a Malay Reservation under the MRE.

[47] In s. 2 of the MRE, the interpretation of Malay holding includes:

> (a) any registered interest of a Malay as proprietor or co-proprietor of any alienated land included in a Malay Reservation duly declared and gazetted under the provisions of this Enactment: *Provided that no such interest shall be deemed to be a Malay holding until there shall have been registered against the register document of title for such land a requisition in Form A in the First Schedule as provided in s. 6*;

(b) any registered interest of a Malay as proprietor or co-proprietor in any alienated land included in a Malay Reservation *duly declared and gazetted under the provisions of the Malay Reservations Enactment, 1913*.

(emphasis added)

[48] Only State land included within a Malay Reservation which is alienated shall be deemed to be a Malay holding as provided by s. 7 of the MRE but save for this, for land included in a Malay Reservation to be a Malay holding or to be deemed to be a Malay holding, the step of having to have it declared and gazetted by way of a requisition in Form A in the First Schedule is required.

[49] Therefore, unless it is State land included within a Malay Reservation which is alienated or land which had already been duly declared and gazetted under the provisions of the Malay Reservations Enactment, 1913, s. 6 MRE enjoins the Collector of the district in which any alienated lands are included in a Malay Reservation to present to the proper registering authority a requisition as prescribed in Form A in the First Schedule containing a list of all alienated lands declared to be in a Malay Reservation **before it is to be treated as a Malay holding**. It provides as follows: (emphasis added)

(i) Upon the publication in the *Gazette* of any notification comprising any declaration whereby any alienated lands are included in a Malay Reservation, the Collector of the district in which such lands are situate shall present to the proper registering authority a requisition in the Form A in the First Schedule containing a list of all alienated lands included in and affected by such declaration and requiring him to note in his registers of titles the fact of the inclusion of such lands in such Malay Reservation.

(ii) Upon the registration of any fresh document of title for any land included in any Malay Reservation, whether such land became included therein before or after the commencement of this Enactment, the Collector of the district in which such land is situate shall present to the proper registering authority a requisition in the Form A in the First Schedule, requiring him to note his register of title the fact on the inclusion of such land in such Malay reservation.

(iii) Upon presentation of a requisition in the Form A in the First Schedule the proper registering authority shall make a memorial thereof upon every register document of title included therein.

(iv) When any memorial has been made upon any register document of title for any land under the provision of subparagraph (iii) the proper registering authority shall by notice in the Form B in the First Schedule require the proprietor of such land or any other person in whose possession the issue document of title for such land may be to deliver the same and upon such delivery shall make on such issue document of title a like memorial as has been made on the register document of title for such land.

(v) *If it shall at any time be made to appear to the proper registering authority that*:

(a) *any register or issue document of title for any land included in any Malay Reservation declared under the provisions of Malay Reservations Enactment, 1913, has not been described with the words "Malay Reservation" as provided by section 12 of the said Enactment, or*

(b) *that in regard to any land included in a Malay Reservation declared under this Enactment no memorial has been made on the register or issue document of title of the fact that such land is included in such Malay Reservation.*

he may present a requisition in Form A in the First Schedule and shall make a memorial thereof on such register or issue document of title. For the purpose of making such memorial on any issue document of title he may by notice in the Form B in the First Schedule require the proprietor or any other person in whose possession it may be to deliver the same.

(vi) Notwithstanding anything hereinbefore in this section contained *the proper registering authority shall not make any memorial under this section on the register or issue document of title for any land which the sole proprietor is not a Malay or of which none of the co-proprietors are Malays.*

(vii) When any such land or any undivided share in such land as is mentioned in sub-section (vi) is transferred to a Malay the proper registering authority shall present a requisition in the Form A in the First Schedule relating to such land and shall thereupon take such action as is prescribed in paragraph (v).

(viii) No fee shall be charged for the making of any memorial or the service of any notice under the provisions of this section.

(ix) Any person who wilfully fails to comply with the provisions of any notice which has been personally served on him under sub-section (iv) or (v) shall be liable to a fine of one hundred dollars.

(emphasis added)

[50] In the case that is before the court, the plaintiff succeeded in the public auction held to have the said property sold pursuant to a court order on the application of the chargee, Bank Islam Malaysia Berhad, which is no doubt, a financial institution.

[51] Section 16 of the MRE deals with sales by encumbrancers and would therefore be particularly relevant. As will be clearly apparent in the provisions of this section reproduced hereunder, for it to be a Malay holding, there is the express need for it to have been declared and gazetted as such. The section provides as follows:

(i) **Subject to the provisions of sub-section (ii)**, if any land included in a Malay Reservation is encumbered, such land may be sold at the instance of the encumbrancer under the provisions of any law in force for the time being.

(ii) **No such land shall be sold, to any person not being a Malay if** at the date of the registration of the encumbrance the sole-proprietor or of such of the co-proprietors of such land was a Malay **and**:

(a) such land was at such date included in a Malay Reservation **duly declared and gazetted** after the commencement of this Enactment, or

(b) such land was at such date included in a Malay Reservation **duly declared and gazetted** after the commencement of this Enactment and the interest of such sole proprietor or of each of such co-proprietorship as the case may be **was a Malay holding within the meaning of paragraph 2(a)**.

(iii) In this section an "encumbrance" **includes a charge**, a caveat in support of a lien by deposit of document of title, an attachment in execution of a decree or other order of Court and an attachment before judgment and an "encumbrancer" **includes a chargee**, a caveator who has caused to be registered such caveat as aforesaid, an attaching creditor and a plaintiff who has obtained an attachment before judgment. (emphasis added)

Critical Issue

[52] The critical issue before this court is now clearly whether the said property, although under Malay Reservation, is a Malay holding.

[53] If it is a Malay holding, the fact that the plaintiff had bought it pursuant to a court order for sale with a certificate of sale by court in Form 16F having been issued in her favour would not make it lawful for her, a non-Malay, to be registered as a proprietor. The Federal Court in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393 in dealing with the validity of Malay Reservations Enactment (FMS Cap 142) in land in the district of Tampin, held that it is well-settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law. On this, the reliance of the plaintiff on the Court of Appeal authority of *Rohaya Ali Haidar v. AmBank (M) Bhd* [2016] 4 CLJ 563; [2016] 2 MLJ 819 for the point that the court has no power to set aside an order for sale by way of a separate application or otherwise is misplaced because the issue is not about setting aside an order for sale but whether the conditions for sale have been complied with, one of the conditions being whether a successful non-Malay bidder may lawfully be registered as the proprietor of the said property under Malay Reservation.

The Plaintiff's Position

[54] The plaintiff in her affidavit in support (encl. 2 paras. 12.2 and 12.3) expressly deposed that the said property is not a Malay holding.

[55] The plaintiff submitted that although it can be seen in the title to the said property (encl. 2 exh. BS-1) an endorsement of "Pengisytiharan Rezab Melayu" there are no other details on its status.

[56] She further submitted that s. 6(ii) and (iii) MRE (*supra*) require the entry of a memorial with a note or endorsement setting out the area and *Gazette* notification number on the issue document of title whether the said property has been declared as Malay holding in a Malay Reservation before or after the commencement of the MRE. This requirement is also needed for any Malay holding in a Malay Reservation declared and gazetted pursuant to the Malay Reservations Enactment, 1913.

[57] By reason of the defendant's failure or neglect to enter the requisite memorial with a note on the area and *Gazette* notification number it is to be presumed as a matter of law that:

(i) There has been incomplete endorsement in breach of the provisions of s. 6 MRE;

(ii) By reason of the incomplete endorsement, the plaintiff cannot be said to have failed to carry out due diligence in (ascertaining the status) of the said property; and

(iii) A mere endorsement of "Pengisytiharan Rezab Melayu" (Malay Reservation) is insufficient for the said property to be a Malay holding.

The Defendant's Position

[58] In answer to the plaintiff's challenge, the defendant in their affidavit in reply (encl. 5 para. 10.2(c)) replied that:

(i) the declaration of the said property as Malay Reservation was gazetted *vide* F.M.S. Government No. 3110 on 25 May 1928 pursuant to the Malay Reservation Enactment 1913, that is, before the MRE. A copy of the *Gazette* was exhibited. A perusal of this exhibit shows that an area in the Mukim of Lekir in the District of Lower Perak had been declared as Malay Reservation on 10 December 1926 and amendments were made to the First Schedule to set out the location of the lands comprising approximately 26,000 acres under Malay Reservation. The Second Schedule sets out the title numbers under Extracts of Mukim Register (E.M.R.) and the lot numbers of the lands.

(ii) The defendant further averred (encl. 5 para. 10.2(e)) that with such declaration and gazetting having taken place before 1933 pursuant to the Malay Reservation Enactment 1913, it is sufficient if a memorial stating Malay Reservation is marked on the register pursuant to s. 6(5)(b) (*sic* – should be 6(v)(b)) of the MRE; and

(iii) Although the said property was not endorsed with "Malay holding" in the document of title, the status of the said property is a Malay holding and cannot be transferred to non-Malays.

[59] Reliance is placed by the defendant on the Federal Court authority of *Abdul Aziz Mohd Alias v. Timbalan Ketua Polis Negara, Malaysia & Anor* [2010] 3 CLJ 643 which had cited s. 18(2) of the Interpretation Acts 1948 and 1967 which, *inter alia*, provides that publication in the official *Gazette* of Malaysia shall constitute sufficient notice of any matter required to be published.

[60] The defendant submits that there is no requirement under the statutory provisions and forms under the First Schedule of the MRE that the document of title must be endorsed with the wording "Pegangan Melayu" (Malay holding").

[61] It is also submitted that, similarly, there is no statutory requirement for the document of title to be endorsed with the area and *Gazette* notification number.

[62] With the plaintiff having noticed that the said property is endorsed with "Pengisytiharan Rezab Melayu" it is for the plaintiff to find out before bidding at the auction whether the said property is a Malay holding or not. For good measure, the defendant added that the plaintiff could make a search at the land office or purchase a plan of the said property but there is no evidence of the plaintiff having done so in this case.

Court's Analysis

[63] A close reading of s. 6(i) and s. 2(a) MRE makes it clear that there is a three step process for land declared under Malay Reservation post the commencement of the MRE to be a Malay holding. The three steps are as follows:

(i) First step - A publication is made in the *Gazette* making notification of the alienated lands that are included in a Malay Reservation;

(ii) Second step - The Collector of the district in which such lands are situated shall then present to the proper registering authority a requisition in Form A in the First Schedule containing a list of all alienated lands included in and affected by such declaration to note in his registers of titles the fact of the inclusion of such lands in such Malay Reservation;

(iii) Third step - The proper registering authority shall then make a memorial upon every register of document of title included in the lands declared as Malay Reservation.

[64] A perusal of the issue document of title of the said property (encl. 2 exh. BS-1) shows that the word "Pengisytiharan Rezab Melayu" (Malay Reservation) has been set out on the title but with no particulars of the date and particulars of the *Gazette* of when the said property was included in a Malay Reservation land and with no particulars as to when the requisition in the prescribed Form A was presented.

[65] The defendant submits that "it is sufficient for the document of title of the land to be endorsed with "Pengisytiharan Rezab Melayu." However, it is made clear by the proviso contained in s. 2(a) of the MRE that **no such interest shall be deemed to be a Malay holding until** there shall have been registered against the register document of title for such land a requisition in prescribed Form A in the First Schedule. (emphasis added). Given this statutory injunction, the court cannot deem the interest in the form of the said property to be a Malay holding until there is evidence before the court to prove that there shall have been registered against the register document of title for such land a requisition in the prescribed Form A in the First Schedule.

The prescribed Form A provides as follows:

THE FIRST SCHEDULE

FORM A

The Malay Reservations Enactment.

REQUISITION UNDER SECTION 6.

To

The Collector of Land Revenue

The Registrar of Titles

Whereas a Malay Reservation known as the Malay Reservation was under the provisions of the Malay Reservation Enactment duly declared and gazetted *vide Gazette* Notification

No. ... of the day ... of , ... 20

And whereas the lands comprised in the titles specified in the Schedule hereto are included in the said Malay Reservation.

I hereby under the provisions of section 6 of the Malay Reservations Enactment, require you to enter memorials on the register documents of title and *on the issue documents of title for the said lands to the effect that the said lands are included in the said Malay Reservation.

Dated this ... day of ..., 20

L.S Collector of Land Revenue
District of

Memorials made in the registers this ... day of ..., 20

L.S Collector of Land Revenue
District of
Registrar of Titles.

[66] The contents of the prescribed Form A would supply the information that the first of the three steps has been carried out with the particulars of the lands specified in a schedule accompanying the Form A detailing the titles of the lands included in the Malay Reservation as declared and the registration of this Form A would complete the second step.

[67] It is only after the registration of the particulars as required in the requisition in Form A against the register document of title of the said property coupled with a memorial on the register and issue document of title of the said property can it then be deemed to be a Malay holding under the law.

Particulars Of The Memorial Required Under Section 6(v) MRE

[68] We now come to the third step which is the making of the memorial. It is plainly set out in s. 6(v) MRE that the particulars of the memorial that are to be endorsed onto the title is the requisition in Form A in the First Schedule seeing that the words "shall make a memorial thereof" with word "thereof" coming immediately after the words "requisition in the Form A in the First Schedule."

[69] Besides the plain meaning of what particulars are required for the memorial, the meaning of the word "thereof" must necessarily be interpreted *noscitur a sociis*, that is, in its context.

[70] The court derives further support for such a construction by perusing the title of the property in dispute involving a Malay Reservation land in Johor which the High Court in *Zaleha bte Sahri v. Pendaftar Hak Milik Johor* (*supra* at p. 14) had helpfully set out and where it can be clearly seen that the registering authority had clearly memorialised onto the issue document of title, the date of declaration and gazetting of the inclusion of the scheduled land as Malay Reservation land.

[71] The step required in s. 6(v) of the MRE is similar to that contained in s. 7(v) of the Malay Reservations Enactment No. 1 of 1936 applicable to the State of Johore. The provisions of s. 7(v) of the [Johore] Malay Reservations Enactment No. 1 of 1936 are reproduced below:

> Provisions as to memorials on document of title
>
> (i) …
>
> (ii) …
>
> (iii) …
>
> (iv) …
>
> (v) If it shall at any time be made to appear to the proper registering authority that in regard to any land included in a Malay Reservation declared under this Enactment no memorial has been made on the register or issue document of title of the fact that such land is included in such Malay Reservation, he may present a requisition in form A in the First Schedule and make a memorial thereof on such register or issue document of title. For the purpose of making such memorial on any issue document of title he may by notice in the form B in the First Schedule require the proprietor or any other person in whose possession it may be to deliver the same.
>
> (vi) …

(vii) …

(viii) …

(ix) …

[72] It also makes sense that these particulars are memorialised so that any party who effects a search would be able to make the necessary verification, if need be, that the scheduled land has in fact been lawfully declared as Malay Reservation land.

[73] It follows that the submission by the applicant that the requirement on the part of the defendant to enter the particulars of a lawful memorial pursuant to s. 6(v) MRE had not been complied with in the case of the said property and by reason thereto the said property is not a Malay holding has merits.

[74] In this case, the title to the said property only carries the endorsement "Pengisytiharan Rezab Melayu" on the register document of title. The question then is, when challenged, as in this case, as to whether the first and second steps have been carried out, who has the burden of proof to show that they have been carried out?

Burden Of Proof

[75] From the provisions of ss. 101, 102, 103 and 106 of the Evidence Act 1950 which are reproduced hereunder, it is clear that unless expressly exempted, the defendant carries the burden of proving that there has been due compliance with all the three steps:

101 **Burden of proof**

(1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

102 **On whom burden of proof lies**

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

103 **Burden of proof as to particular fact**

The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

106 **Burden of proving fact especially within knowledge**

When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

[76] The court is of the view that pursuant to ss. 101, 102, 103 and 106 of the Evidence Act, the defendant has the legal and evidential burden to prove that the said property is Malay Reservation land **and** is a Malay

holding so as to invoke all the prohibitions and restrictions in its dealings as provided by the law which the defendant seeks to rely upon to defeat the plaintiff's claim. Further, it cannot be denied that under the MRE statutory scheme, there are positive acts required by s. 6 MRE of the proper registering authority before the land can be deemed to be a Malay holding. Whether these acts have been carried out is a question of fact and it is, therefore, for the defendant to lead evidence that these acts have been carried out because these facts would be especially within the knowledge of the defendant.

[77] Therefore, unless it is State land within a Malay Reservation which is alienated and therefore deemed to be a Malay holding pursuant to s. 7 MRE, in order to rely upon the prohibitions and restrictions in the MRE to prohibit and restrict any dealings in Malay Reservation land by the plaintiff, the defendant has to prove that all three steps have been taken.

[78] On the facts that obtain in this case, there is no evidence that the first and second steps have been undertaken for the said property.

[79] However, the defendant has also relied upon the provisions of s. 2(b) (*supra*) in aid of their submissions that the said property is a Malay holding.

[80] As discussed earlier, the defendant submits that a declaration and gazetting has been done *vide* F.M.S. Government No. 3110 on 25 May 1928 ("1928 *Gazette* Notification") pursuant to the Malay Reservation Enactment 1913. The defendant submits that the *Gazette* notification (encl. 5 exh. MN-1) being one done under the provisions of the Malay Reservations Enactment, 1913, the said property is a Malay holding.

[81] However, despite studying the 1928 *Gazette* Notification closely, the court is not able to discern the evidential nexus that the said property is part of the lands set out in the (Second) Schedule listing the lands declared to be Malay Reservation. Just because there is a mention of Mukim Lekir with the declared lands said to have an approximate area of 26,000 acres does not prove that the said property is within the lands so described in the 1928 *Gazette* Notification.

[82] The court is also mindful that the said property is one sold by an encumbrancer pursuant to an order for sale and by reason of this, the provisions contained in s. 16 MRE (*supra*) would be more relevant. Section 16(ii)(b) and (iii) MRE provides that a Malay holding subject to a sale by an encumbrance such as a charge is one within the meaning of s. 2(a) MRE which would require the three-step process detailed above.

[83] The plaintiff had also pointed out (encl. 2 BS-7) that by way of a circular issued on 1 June 1976, the Director of Lands and Mines had advised all Collectors on the provisions of s. 2 MRE and for all of them to take immediate steps to ensure that the requirements of s. 6(1) (*sic* – should be 6(i)) MRE are given immediate attention. Indeed, the circular entitled "Surat Pekeliling Pengarah Tanah Dan Galian, Perak, Bil. 6/76 carries this exhortation:

A Adalah didapati masih banyak lagi tanah-tanah yang diwartakan sebagai Rizab Melayu mengikut Malay Reservation Enactment Cap 142 *tidak mempunyai catatan mengikut Seksyen 6(1)* (*sic* – should be (i)) enakmen tersebut. Dengan yang demikian tanah-tanah Rizab Melayu tersebut mengikut pengertian Malay Holding di atas *tidak lagi boleh dianggap sebagai Malay Holding walaupun tanah itu sudah diwartakan sebagai Rizab Melayu* dan
B dimilik oleh orang-orang Melayu. *Ini bermakna semua urusan-urusan tanah yang diserahkan untuk pendaftaran boleh didaftarkan sekiranya tanah-tanah yang berkenaan tidak jatuh di bawah pengertian Malay Holding …*

Dengan ini Pemungut Hasil Tanah sekalian adalah dinasihatkan supaya menyemak semua tanah-tanah yang telah diwartakan sebagai Rizab
C Melayu dalam daerah masing-masing. *Pemungut Hasil Tanah hendaklah menentukan iaitu bagi semua tanah Rizab Melayu yang diwartakan selepas tahun 1933 di bawah Malay Reservation Enactment Cap 142 tindakan untuk pendaftaran catatan di bawah seksyen 6 hendaklah dijalankan sekiranya belum dijalankan …* (emphasis added)

D **[84]** Finally, but by no means the least, faced with a challenge on whether the said property is or is not a Malay holding, the defendant being the Registrar of Titles could have easily produced the evidence to show that the first and second steps have been complied with. In the two affidavits (encls. 5 and 7), the defendant did not and instead sought to rely upon a
E *Gazette* notification published some 72 years ago, in 1928, and which does not identify the said property in it. If the defendant could produce evidence of what had taken place some 72 years ago but is not able to produce evidence of more recent origin; namely, the requisite Form A and its registration, the court can only conclude that the requisite first and second steps have not been carried out as to confer upon the said property the status
F of a Malay holding.

[85] The encumbrancer in this case is Bank Islam Malaysia Berhad and from the title (encl. 2 exh. BS-1), the encumbrance in the form of a charge was registered on 8 March 2003. The MRE came into force on 15 December 1933. As the charge was registered after the commencement of the MRE, the
G declaration and gazetting of the said property as Malay Reservation must be that done after 15 December 1933. It follows that the reliance by the defendant upon a declaration and gazetting of Malay Reservation land done on 25 May 1928, which is before 15 December 1933, is wholly misplaced as such declaration and gazetting would not come within both s. 16(ii)(a) or
H (b) (*supra*) as to prohibit or restrict a non-Malay from buying the said property.

Claim For Refund Of Fees

[86] On the plaintiff's claim for refund of fees, the defendant relies upon
I **s. 293(1) and (2) of the NLC** to submit that a processing fee has to be paid for each transaction. The relevant provisions are reproduced hereinbelow:

293 (1) **Every instrument presented** for registration under this Part shall be accompanied by:

(a) **the prescribed registration fee**, and

(b) **if it is presented more than three months after the date thereof, a delayed registration fee** calculated in accordance with the provisions of sub-section (2);

(2) The amount of the delayed registration fee payable in respect of any instrument shall be the amount of the prescribed registration fee multiplied by the number of completed periods of three months which have elapsed since the date thereof:

Provided that the said fee shall not in any case exceed five times the amount of the prescribed registration fee.

(3) The Registrar may, if he is satisfied that good grounds exist for the delayed presentation of any instrument, or that it would for any other reason be just to do so:

(a) refund, in whole or in part, any delayed registration fee tendered to him pursuant to this section, or

(b) ....

(4) **No fee paid pursuant to this section shall be refunded otherwise than in the circumstances specified in paragraph (a) of sub-section (3); and where any instrument which has been** withdrawn under section 296, or **rejected in accordance with the provision of Chapter 2** or Part Nineteen, **is again presented for registration, no credit shall be given for any fee or fees paid on its previous presentation**. (emphasis added)

Conclusion

[87] In the upshot, the court holds that the said property is not a Malay holding under the MRE and grants an order in terms of prayers (i), (ii) and (iii) of encl. 1 with costs to the effect that the said property is not a Malay holding and can be registered under the plaintiff's name and the defendant do register and issue the plaintiff an issue document of title in the plaintiff's name within 14 days from the date of the order made herein.

[88] Although the court has held that the said property is a non-Malay holding, the plaintiff has deemed it fit to challenge the rejection only after the second presentation and by reason thereto, bearing in mind the provisions of s. 293(1) of the NLC that every instrument presented has to be accompanied by the prescribed registration fee and that pursuant to s. 293(3)(a) of the NLC the Registrar ought not to have penalised the plaintiff, the court orders the refund of the penalty of RM750 to the plaintiff.